No. 11759.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

DOUGLAS AIRCRAFT CO., INC., a corporation, and THOMAS W. SCOTT,

Appellees.

APPELLANT'S REPLY BRIEF.

JAMES M. CARTER,
United States Attorney,

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Acting Chief, Civil Division

CAMERON L. LILLIE,
Assistant U. S. Attorney,
United States Postoffice and
Courthouse Building, Los Angeles 12,
Attorneys for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX

AUTHORITY CITED

No. 11759.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

DOUGLAS AIRCRAFT CO., INC., a corporation, and THOMAS W. SCOTT,

Appellees.

APPELLANT'S REPLY BRIEF.

Preliminary to dealing with the two main points discussed in Appellees' Brief, we reiterate, at this time, for purposes of clarity only, our contentions.

We respectfully submit that the evidence on the issue of negligence and that of contributory negligence is such that the Trial Court should not have submitted them to the jury as questions of fact but should have decided them as a matter of law.

I.

From the Undisputed Evidence, Fair-Minded Men Could Draw Only One Conclusion—That Defendant Scott Was Negligent and His Negligence Was the Proximate Cause of the Damage to Plaintiff's Plane.

The testimony, as reflected in the Statement of Facts of both Appellant's Opening Brief and Appellees' Brief, discloses that the facts surrounding the collision in question are undisputed. This allows appellant to take advantage of the law in *Brinegar v. Green et ux.*, 117 F. (2d) 316, at page 319, cited in Appellees' Brief at page 9. We have no quarrel with the rule set out in that case. In fact we cite it now in support of our contention that the question of negligence was one for the court to decide as a matter of law and not for the jury to decide as a question of fact.

By the test laid down in the *Brinegar* case, the facts here are such that fair-minded men may reasonably draw but one conclusion from them—that Defendant Scott was negligent.

No counsel could seriously deny that the facts are not in dispute. We have only Defendant Scott's version of how the collision occurred, Pitcairn, pilot for the Government plane having died prior to trial.

As we view Defendant Scott's course of conduct, as set out in Appellees' Brief, we notice with interest that bare mention is made of the activities of Scott immediately prior to the collision. Those activities, we respectfully submit, show without doubt clear negligence on Scott's part, and that his negligence was the proximate cause of the plaintiff's damage. His conduct leading up to the runway, careful as he might have been, could not

and do not excuse the lack of due care on the part of Defendant Scott in his subsequent conduct on the runway immediately preceding the accident. This subsequent lack of due care was the cause, without which the collision would not have occurred. His own uncontradicted testimony shows that just before he collided with the Government's plane Defendant Scott looked, but failed to see that which was in plain sight. This is actionable negligence.

Appellees attempt to discredit the application of this basic rule of negligence by saying that the object (plane) was not in plain sight and that Defendant Scott had an obstructed view of same. An examination of Scott's testimony will convince you otherwise. Let us see what the facts show:

Defendant Scott testified that he landed on the main runway 25-R at approximately 2 P. M. on a clear day with good visibility [R. 58, 71] (in fact visibility was good at 300 feet); that he taxied down the diagonal runway making S turns at 15 degree angles in order to see that the way was clear [R. 53, 63, 64]; that at the intersection of 25-L and 25-R he stopped and turned his plane in an easterly direction and stayed there a minute to watch a plane take off [R. 50-53, 58, 89, 123, 133, 136, 138, 142]; that he looked across the main runway 25-L and down 25-R upon which the Government's P-51 plane was parked and crossed the runway in a hurry because the field was busy [R. 53, 63, 64]; that after entering 25-R on which the Government plane was parked, he began to taxi at about 8 to 10 miles per hour [R. 64], and started "S"ing his plane at 15° angles from right to left to see if his way ahead was clear [R. 53, 54, 133, 136, 138, 142]; that he looked but did not see the Government plane [R. 77]. The testimony Defendant Scott gave concerning

what he did after he started "S"ing his plane and up to the time of impact shows his unobstructed view of the Government plane which was in plain sight. See Record, page 54:

> "Q. The purpose of the 'S'ing was to get a clear unobstructed view of the diagonal down which you were proceeding. Is that correct? A. (of Scott) That is correct.
>
> Q. And you did that? A. Yes.
>
> Q. And you looked? A. Yes."

Again, at page 53, Scott answered:

> "As I turned the plane to the left I could see out the right side. Down the diagonal I could see all the right side."

By Mr. Brewer, at page 66:

> "Q. Your only visibility to the front was by 'S' turns, is that it? A. That is correct."

Without further argument it is apparent that by Defendant Scott's own testimony he had an unobstructed view of the Government's plane which was in plain sight, which plane he failed to see. Appellant Scott at no time ever gave any reason for failing to see the Government plane immediately before the collision. Interestingly enough, Defendant Scott testified his right wing hit the fin or tail fin of the Government plane [R. 67], and that the Government plane was parked on the right side of the runway. In view of his further testimony at page 53, that he turned the plane left so he could see out the right side and that he could see all the right side, it is difficult to absolve him from a violation of his duty to see that which was in plain sight. He seeks relief now from answers to scattered questions of his counsel relative to the color of the Government plane and that of the grass,

runway and hills. This testimony cannot avail the Appellees because Defendant Scott many times during the trial admitted seeing, without apparent difficulty, all kinds of planes flown all over the same field, with the same grass, runway, and hills as background [R. 51, 58, 59, 60]; also no one else seemed to have any difficulty in seeing the plane, even at 300 feet.

Actually, if Defendant Scott cares to admit that his failure to see the Government plane was because of its color, those circumstances certainly put an added burden on the defendant to proceed with caution, especially when he knew the field was a busy one on that day.

In addition, it would appear that the Defendant Scott should have foreseen the presence of other planes on the runway and kept a lookout for them. He knew it was a busy field on that day and that other planes were using the diagonal. There was a distinct duty on the part of Defendant Scott under those conditions to keep a lookout for possible danger. See page 63:

> "Q. You were asked the question if you were in a hurry to cross the main air strip. Why was that, sir? A. Just in case somebody else might be landing that I didn't see."

And again at page 64:

> "Q. That was a pretty busy field at that time, was it not? A. Yes.
>
> Q. Lots of planes landing taking off, is that correct? A. That's right."

Comment is made by Appellee that in all cases cited by counsel in support of our contention that Defendant Scott was negligent in failing to see what was in plain sight, the question of negligence was submitted to the jury. That is true but in each case the evidence was in dispute. In the instant case there is no dispute as to facts.

II.

Appellant Was Not Guilty of Any Contributory Negligence.

Similar to the question of Defendant Scott's negligence is that of the conduct of Appellant. As hereinabove already pointed out in Paragraph I, it becomes solely a question of law when, as in the instant case, there is no dispute in the evidence, and where, from the undisputed facts, reasonable men can draw but one conclusion.

The facts showing the conduct of the pilot for the Government plant, Pitcairn, before the accident are not in dispute. Because the pilot died before the trial, we must rely entirely upon the testimony of Defendant Scott and the operator of the Air Control Tower for the fact of Pitcairn's conduct. No contradictory evidence was or could be offered.

The only possible way in which Appellees could sustain their claim of contributory negligence on the part of the Government would be to show either that Pitcairn was negligent in parking the Government P-51 on the edge of the diagonal runway or that the operator of the Air Traffic Control Tower was negligent in handling the traffic on the field at the time of the collision.

We respectfully submit that the undisputed testimony discloses not one scintilla of evidence of negligence on the part of either Pitcairn or the operator and reasonable men could not under any reasonable interpretation draw a contrary inference.

Considering now the conduct of Pitcairn directly before the collision, we respectfully point to the following facts:

(A) After conducting a test flight for the Government, and while still in the air, the pilot of the Government's

P-51, Pitcairn, radioed a request to the Air Traffic Control Tower for a tractor to meet him and tow the P-51 to the parking area. [R. 118, 122.]

(B) Pitcairn parked the Government P-51 on the diagonal runway, which is 150 feet wide. [R. 74; Pltf. Ex. 1.]

(C) He parked the plane on the right side of the runway facing West, with both wheels on the edge of the runway. [R. 44, 45, 68-70.]

(D) The plane was parked by Pitcairn as close to the edge as possible.

> "It was close to the edge of the runway, his wheels were, as close as he could get, I would say." [Testimony of Defendant Scott, R. 73.]

(E) It was customary in that airport to park Government P-51 test flight planes on the diagonal runway where Pitcairn parked the Government plane in question. [R. 40.]

(F) In keeping with this there was no rule or regulation prohibiting the parking of planes on runways. [R. 128.]

Most important of all is the testimony of Defendant Scott that Pitcairn parked the Government plane in such a way that 120 feet was left free on the runway to let other planes pass.

> "Q. Now the runway is 150 feet wide. How much space would he have been taking up on that runway? A. Not over 30 or 35 feet, I wouldn't think.

Conclusion.

We respectfully submit the evidence on both the issue of negligence and contributory negligence is such that the Trial Court should have decided both rather than submit them to the jury as questions of fact.

For this reason we respectfully submit that the judgment of the District Court be reversed.

Respectfully submitted,

JAMES M. CARTER,
United States Attorney,
CLYDE C. DOWNING,
Assistant U. S. Attorney,
Acting Chief, Civil Division
CAMERON L. LILLIE,
Assistant U. S. Attorney,
Attorneys for Appellant.